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CASE NO. _____

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In The Supreme Court of the United States

OCTOBER TERM, 1983

ARTHUR TATE JR., Superintendent
Chillicothe Correctional Institute

Petitioner,

v.

CHARLES E. ROSE

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER A STATE COURT CONVICTION INVOLVING TWO WHOLLY EXCULPATORY STATEMENTS OF UTILITY ONLY IN IMPEACHING THE TRIAL TESTIMONY OF THE ACCUSED AND MADE TWO AND ONE HALF YEARS PRIOR TO THE DATE OF THE DECISION IN *EDWARDS v. ARIZONA*, 451 U.S. 477 (1981), CAN BE VACATED BY A FEDERAL HABEAS CORPUS COURT IN LIGHT OF THE LIMITED RETROACTIVE APPLICATION AWARDED *EDWARDS* BY THE DECISION IN *SOLEM v. STUMES*, _____U.S._____ , 52 U.S.L.W. 4307 (FEBRUARY 29, 1984).

PARTIES

The petitioner in this action is Arthur Tate Jr., in his capacity as Superintendent of the Chillicothe Correctional Institute and successor custodian to Ted Engle. The respondent is Charles E. Rose.

INDEX

	Page
QUESTION PRESENTED	i
PARTIES	ii
INDEX TO AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
ARGUMENT IN SUPPORT OF GRANTING CERTIORARI	15
CERTIFICATE OF SERVICE	A-42

INDEX TO AUTHORITIES

Page

Cases:

Chapman v. California,
386 U.S. 18 (1967) 9

Edwards v. Arizona,
451 U.S. 477 (1981) 8, 9, 10, 15, 16, 17, 18, 19

Johnson v. Zerbest,
304 U.S. 458 (1983) 15, 19

Miranda v. Arizona,
384 U.S. 436 (1966) 16, 19

Oregon v. Bradshaw,
_____U.S._____, 77 L. Ed. 2d.
405 (1983) 15, 16

Oregon v. Hass,
420 U.S. 714 (1975) 14

Rose v. Engle,
722 F. 2d. 1277 (6th Cir. 1983) 9

Solem v. Stumes,
_____U.S._____, 52 U.S.L.W. 4307
(February 29, 1984) 10, 15, 16, 18, 19

Stumes v. Solem,
671 F.2d 1150 (8th Cir. 1982) 10

United States v. Johnson,
457 U.S. 537 (1982) 9

Statutes:

28 U.S.C. Section 2254 . . . . . .8, 16
Ohio Revised Code Section 2903.01 3
Ohio Revised Code Section 2903.02 3

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is reported as *Rose v. Engle,* 722 F. 2d 1277 (6th Cir. 1983). (A-1) The decision of the United States District Court for the Southern District of Ohio, Eastern Division is unreported. (A-15) The decision of the Ohio Court of Appeals for the First Judicial District is unreported. (A-29)

JURISDICTION

The decision of the United States Court of Appeals for the Sixth circuit was entered on November 28, 1983. The order of the Circuit court denying rehearing and rehearing en banc was entered on January 26, 1984. Jurisdiction is conferred by 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Amendment V to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall

> be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The case also involves Section 1 of Amendment XIV to the Constitution of the United States:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ARTHUR TATE JR., Superintendent
Chillicothe Correctional Institute,
Petitioner,

v.

CHARLES E. ROSE,
Respondent.

STATEMENT OF THE CASE

Respondent Charles E. Rose was indicted by the Warren County, Ohio, Grand Jury on one (1) count for the crime of aggravated murder in violation of Ohio Revised Code Section 2903.01 (A). The indictment stemmed from the killing of respondent's crippled wife. Upon arraignment, respondent entered a plea of not guilty and the cause came on for jury trial. The jury returned a verdict of guilty of the lesser included offense of murder in violation of Ohio Revised Code Section 2903.02.[1] On May 30, 1979, the state trial court sentenced respondent to a term of from fifteen (15) years to life imprisonment.

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[1] Ohio Revised Code Section 2903.02 provides:

No person shall purposely cause the death of another.

Respondent perfected an appeal to the Ohio Court of Appeals for the First Judicial District. As his initial assignment of error, respondent contended that the trial court erred in failing to suppress certain of his custodial statements. The Ohio appellate court rejected respondent's claim as follows:

> The first of the appellant's three assignments challenges, on constitutional grounds, the admission into evidence of certain statements made by the appellant to the Chief of Police of the Franklin, Ohio, police department during the course of a custodial interrogation initiated after the appellant's arrest. It is argued that such statements should have been excluded at trial because they were given without a waiver in violation of the appellant's rights as defined in *Miranda v. Arizona,* (1966), 384 U.S. 436, 86 S. Ct. 1602, and *Michigan v. Mosley,* (1975), 423 U.S. 96, 96 S. Ct. 321.
>
> The facts and circumstances attendant to the appellant's interrogation as they were developed in the proceedings below show that the appellant was arrested by an officer of the Franklin, Ohio, police department on the afternoon of December 2, 1978, at approximately 4:30 p.m. The arrest was made at a residence within the immediate vicinity of the scene of the killing for which the appellant was later charged. After being informed by the appellant that he had just shot his wife,

the officer transported him to a police station house where the appellant was read his Miranda rights. Upon being apprised of his rights, the appellant indicated to the officer that he would not respond to any questions from him until he had opportunity to retain an attorney.

The appellant was thereupon placed in a jail cell at the station house until approximately 6:25 p.m. on that same day, at which time, he was escorted into an office occupied by the Chief of Police of Franklin, Ohio. Before embarking upon any form of interrogation, the Chief informed the appellant that his wife was dead and that he was being charged with her murder. He also readvised the appellant of his Miranda rights, and asked him if he understood them. The appellant replied that he understood his rights, and proceeded to sign a waiver-of-rights form. He then began a patently contradictory explanation of the circumstances surrounding his wife's death, the substance of which he later sought to exclude from evidence at trial.

The appellant's argument that the statements at the station house were obtained in violation of his constitutional rights is bottomed first upon the blanket assertion that any statement made in a custodial setting after the accused has expressed an

intent to exercise his right to counsel is constitutionally infirm. In formulating such a rule, he relies primarily on *Miranda v. Arizona, supra,* and *State v. Korn,* No. CA77-07-0084, unreported (1st Dist. 1979).

Although it is true that *Miranda* contains language tending to support the appellant's argument in support of a per se rule it is equally clear in light of subsequent interpretations of that decision that such a rule has not yet been adopted. See *Michigan v. Mosley,* (1975), 423 U.S. 96, 98 S. Ct. 321; *White v. Finkbeiner,* (7th Cir. 1979), 611 F. 2d 186; *United States v. Rodriquez-Gasteium,* (9th Cir. 1978), 569 F. 2d 482. Cf. *State v. Black,* (1976), 48 Ohio St. 2d 262, 358 N.E. 2d 551, vacated and remanded on other grounds, 438 U.S. 910. In *Mosley, supra,* the Supreme Court of the United States, per Stewart J., rejected a similar per se approach to the resumption of a custodial interrogation after the accused has invoked his right to remain silent by recognizing that such a posture "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests." 423 U.S. at 102. Instead, the Court concluded that:

> "Admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his right to cut off questioning was scrupulously honored." 423 U.S. at 104.

Upon examination of the record in the instant cause, we are convinced that the police officers who questioned the appellant after his arrest displayed the necessary scrupulous regard for his constitutional rights. When the appellant first indicated upon his arrival at the station house that he would not speak at that time without the assistance of counsel, it is uncontroverted that the officer who had earlier read him his rights immediately cut off any dialogue which could have been construed as an interrogation, and confined the appellant to a jail cell. It was not until approximately ninety minutes later that the appellant was next confronted by a second law enforcement official.

* * *

In light of the appellant's execution of the waiver form and the other circumstances attendant to his interrogation which are described above, we are convinced that the judge presiding at trial was entitled to conclude that he had, in fact, knowingly and voluntarily waived his *Miranda* rights

> upon an independent and rational reassessment of his interests. See *North Carolina v. Butler,* (1979), _____U.S._____, 99 S. Ct. 1755; *Brewer v. Williams,* (1977), 430 U.S. 387, 97 S. Ct. 1232, *State v. Scott,* (1980), 61 Ohio St. 2d 155, _____U.S._____ ; *State v. Reese,* No. C-790596, unreported (1st Dist. 1980). [A-30], [A-34] [Footnotes omited]

Respondent thereafter sought discretionary review of the appellate court affirmance. However, on March 18, 1981, the Supreme Court of Ohio overruled respondent's motion for leave to appeal. Respondent did not file a petition for writ of certiorari with this Court. Sixty-one (61) days *after* the Supreme Court of Ohio denied discretionary review, this Court issued the decision in *Edwards v. Arizona,* 451 U.S. 477 (1981).

On December 10, 1981, respondent filed a petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254 with the United States District Court for the Southern District of Ohio, Eastern Division. On December 29, 1982, the district court issued an opinion and order finding that certain of respondent's custodial statements had been taken in violation of the prophylactic rule enunciated in *Edwards v. Arizona, supra.* (A-15) While acknowledging that the decision in *Edwards* was issued some two and one half years after the custodial statements were taken, the court held that *Edwards* was fully retroactive by stating:

> The Court is cognizant of the fact that *Edwards v. Arizona, supra* was decided after petitioner's trial and that one judge

> of the United States Court of Appeals for the Sixth Circuit intimated in dicta that he did not believe that *Edwards* would apply retroactively. *United States v. Holliday,* _____F. 2d_____ (6th Cir. 1981) (slip opinion, p.3 n.1). Nonetheless, this Court is of the opinion that *Edwards* does not represent a change in the law as enunciated in *Miranda.* The Eighth Circuit in *Stumes v. Solem,* 671 F. 2d 1150, 1155-1158 (8th Cir.) applied *Edwards* retroactively. (A-22)

The district court went on to hold that admission of the statements in issue did not fall within the ambit of the harmless error doctrine.

Petitioner perfected a timely appeal to the United States Court of Appeals for the Sixth Circuit. On November 28, 1983, the circuit court issued a 2-1 decision affirming the district's court grant of the writ of habeas corpus. *Rose v. Engle,* 722 F. 2d 1277 (6th Cir. 1983) (A-1) Utilizing an analysis predicated upon the decision in *United States v. Johnson,* 457 U.S. 537 (1982), the circuit court majority held that *Edwards v. Arizona, supra* was retroactive and further held that admission of the statement did not constitute harmless error. In dissent, Judge Wellford stated that, retroactivity aside, any error in the admission of the statements was harmless under the standards articulated in *Chapman v. California,* 386 U.S. 18 (1967).

On January 26, 1984, the circuit court issued an order denying petitioner's motion for rehearing and suggestion of rehearing en banc. (A-14) The circuit

court refused to stay the mandate pending certiorari review by this Court and an ensuing application for stay, addressed to Justice O'Connor, was denied. Thereafter, on February 29, 1984, this Court issued the decision in *Solem v. Stumes,* _____U.S._____, 52 U.S.L.W. 4307 February 29, 1984.[2]

The evidence presented against respondent during the course of his state court trial was quite simply overwhelming and is summarized as follows.

Respondent married Jewell Rose, the decedent, on July 1, 1977. The decedent was a crippled woman (T. 205), very short, 4' 10" (T. 201) and very heavy (213 pounds) (T. 201). She owned the house in which she lived with respondent (T. 481-482). They had a history of marital discord which included violent exchanges (T. 439). On the morning of December 2, 1978, Jewell Rose was "mad" or upset with respondent about something (T. 456) and she packed his clothes and loaded them into his car (T. 480-481). After his wife loaded his clothing into the car, respondent left the house and went "shopping" (T. 456-458).

Later that day, at approximately 4:00 p.m., respondent entered the Western Auto Store in Franklin, Ohio, and purchased a handgun, the only handgun they had in the store (T. 149) which was a .22 revolver, and fifty (50) rounds of live ammunition (T. 147-153). The owner of the Western Auto testified that respondent came to the store initially at approximately 3:30 p.m. and inquired

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[2]This Court's decision in *Solem v. Stumes, supra,* reversed the circuit court opinion in *Stumes v. Solem,* 671 F. 2d 1150 (8th Cir. 1982); the very decision upon which the district court predicated its holding that *Edwards v. Arizona, supra,* was applicable to the instant case.

about the purchase of a handgun. He left and later returned to make the purchase. Upon being required to complete an official questionnaire to conclude the transaction, respondent stated: "You must think I'm going to shoot someone." (T. 152). Respondent testified he had prior experience with firearms, including handguns.

Twenty (20) minutes after respondent left the store with his gun and ammunition, Franklin police officers received a call concerning a shooting incident on 722 Park Avenue, the home of the decedent (T. 162-166). Jewell Savage, a neighbor, testified that about 4:00 p.m. on the day of the shooting she observed respondent staggering through the alley which separates their houses with a gun in his hand, heading toward the home of neighbor, Sandy Stephens. It was she who immediately called the police. (T. 175). Officers responding to the scene found the body of respondent's wife, who had been shot through the heart, lying in the doorway of the home.

After the shooting, respondent went to Charles and Sandy Stephens' house and made comments heard by Mr. Stephens, his wife Sandy and Mrs. Stephens' sister, Verla Raney and Phillis Raney. Mr. Stephens testified that he was sleeping before respondent came to his house, but he awoke and heard respondent say, "Sandy, go check on her. If she's hurt bad, I have a murder rap." Respondent said nothing about an "accidental" shooting (T. 186). Verla Raney testified that when respondent entered the house, he said, "Sandy, you got to hide me. I just shot my wife." She also recalled his later statement that "if she was dead, he would take a murder rap." Sandy Stephens testified respondent told her to take the gun and hide it.

Respondent was arrested at the Stephens' home. Respondent told Officer Pressler, "I shot my wife." (T. 166). Officer Pressler then transported respondent to the police station and advised him of his constitutional rights (T. 168). After stating that he understood these rights, respondent told Officer Pressler that he did not want to discuss the incident with him (T. 168) and that he wanted to have an attorney (T. 172). Respondent was then removed to the jail (T. 168).

Approximately one hour and thirty minutes later, Franklin Police Chief, George Hamilton, not knowing that respondent had requested counsel, interviewed respondent, again advising him of his Miranda rights, concerning the incident (T. 218). Respondent stated that he understood his constitutional rights and executed a written waiver of such rights prior to questioning. Respondent told conflicting versions of what had transpired (T. 235). Initially, respondent stated that his wife had shot herself (T. 235). When reminded that two shots were fired from the gun, he next stated that the gun fired accidentally while he and his wife were engaged in an argument and struggle over the gun (T. 255). Respondent then told Chief Hamilton he would relate the truth about the shooting if the chief would promise to let him go home (T. 366). The discussion ceased when Chief Hamilton received a call from respondent's attorney (T. 223).

Police subsequently searched respondent's car and found a box of .22 shells on the dash, clothing and personal articles stacked on the passenger seat and back seat of the car (T. 266), a live shell on the front seat, and the empty carton from which the pistol had been removed (T. 266).

Dr. Paul Jolly, Deputy Coroner testified that the victim died as a result of a single bullet wound through the heart, and the bullet was ballistically shown to have been fired from the gun that respondent had purchased on the day of the shooting. The shot was fired from a range of four (4) feet. Testimony was also adduced that the gun involved had a heavy pull and could not be fired without pulling the trigger.

At trial, in addition to testifying about his wife's packing his clothes into the car, respondent admitted to loading the revolver in his car, parked in the driveway, with nine (9) bullets just prior to entering the house (T. 465, 491). He then fired a shot through the floorboard of his car. He then took the gun into the house and laid it on a table. Respondent then claimed he was "messing around" with the gun when his wife entered the room and the gun went off inadvertently (T. 504-505). Respondent testified he loaded the gun in the driveway, went immediately into the house and accidentally shot his wife through the heart at a distance of four (4) feet while trying to unload the same gun he had loaded only moments before entering the house (T. 468, 501-502). The jury rejected this totally incredulous story and found respondent guilty of murder.

In his dissent in the court below, Judge Wellford summarized what he characterized as the "remarkable defense theory" as follows:

> To believe defendant's story therefore requires that one believe that, within a short time after purchasing a gun, defendant accidentally fired the gun

> twice; it further requires that one believe that defendant, shortly after accidentally discharging the gun while loading it, nevertheless unloaded the gun while pointing it at his wife's heart from a distance of four feet. Given this remarkable defense theory, admission of the contested statements here was harmless beyond a reasonable doubt. (A-12)

Judge Wellford went on to observe that the wholly exculpatory nature of the two (2) statements in issue, i.e., that respondent's wife shot herself or that respondent shot her accidentally, were only of utility to the prosecution insofar as they impeached the credibility of respondent's trial testimony and thus proper pursuant to the decision of this Court in *Oregon v. Hass,* 420 U.S. 714 (1975). To this end, Judge Wellford stated:

> Furthermore, the procedural posture of this case seems to support the conclusion that any error here was harmless. Because defendant testified, the district court found that the contested statements would have been admissible for impeachment purposes even if obtained unconstitutionally; defendant did not dispute that conclusion. Despite this conclusion, the district court issued the writ of habeas corpus, noting that the statements, while admissible for impeachment, were not admissible for the truth of the matter asserted. That distinction, however, is of no significance in this case. The contested

> statements here were intended to be exculpatory: if either had been believed, or if they created a reasonable doubt, defendant could not have been convicted of intentionally killing his wife. Because the statements were supposedly exculpatory, their only possible use was for impeachment; any error in admitting them here was harmless, even if *Edwards* is applicable.
> (A-12)

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

The instant case presents an important issue of constitutional law regarding a question expressly left open by this Court's recent decision in *Solem v. Stumes,* _____U.S._____ , 52 U.S.L.W. 4307 (February 29, 1984).

In *Edwards v. Arizona,* 451 U.S. 477 (1981), this Court held that ". . .an accused. . .having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversation with the police." 451 U.S. at 484-485. This principle enunciated in *Edwards* ". . .was in effect a prophylactic rule." *Oregon v. Bradshaw,* _____U.S._____ , 77 L. Ed. 2d 405, 411 (1983). The "suspect-initiated" rule fashioned in *Edwards* was a *per se* rule which went beyond the *Johnson v. Zerbst,* 304 U.S.

458 (1938) waiver standard cited in *Miranda v. Arizona,* 384 U.S. 436 (1966). *Oregon v. Bradshaw,* _____U.S. _____, 77 L. Ed. 2d at 413.[3]

The lower state and federal courts thereafter split upon the issue of whether the decision in *Edwards v. Arizona, supra,* should be applied retroactively. In order to resolve this conflict, this Court granted certiorari in *Solem v. Stumes, supra.* In *Stumes,* this Court held that the rule established in *Edwards* should not ". . .be applied in *collateral review of final convictions."* _____U.S._____, 52 U.S.L.W. at 4310 (emphasis added).

While the instant controversy clearly arose upon collateral review, i.e., by means of an action brought pursuant to 28 U.S.C. Section 2254, the court below reasoned that respondent's conviction was not "final" by stating as follows:

> The alternative argument that *Edwards* is inapplicable to this case because *Edwards* applies retroactively only to those cases not yet final when *Edwards* was decided is similarly unavailing because on May 18, 1981, when *Edwards* was decided, Rose's case was still pending on direct appeal. As the Supreme Court noted in *Johnson,*

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[3]The dissent in *Bradshaw* similarly viewed *Edwards* as having established a new prophylactic rule and stated:

> In any event, no confusion on this point can remain after today's decision for eight Justices manifestly agree that *Edwards* did create a per se rule. The plurality explicitly refers to the "prophylactic rule" of *Edwards.* _____U.S._____, 77 L. Ed. 2d at 418 n.2.

> "By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed [or a petition for certiorari finally denied, all] before our decision in *Mapp v. Ohio.*" *Linkletter v. Walker,* 381 U.S. at 622, n. 5. See also *Tehan v. United States ex rel. Schott,* 382 U.S. 406, 409, n.3 (1966).

102 S. Ct. at 2583 n. 8 (emphasis added; alteration of quotation in original). Rose's appeal was dismissed by the Supreme Court of Ohio on March 18, 1981. Rose had sixty days from that date to file a petition for certiorari. Sup. Ct. R. 20; 28 U.S.C. Section 2101 (1976). Because the sixtieth day from March 18, 1981 was a Sunday, May 17, 1981, the period for Rose's filing a petition for certiorari did not elapse until the end of the next day, May 18, 1981. Sup. Ct. R. 29. On May 18, 1981, *Edwards* was decided by the Supreme Court and, accordingly, Rose's case was still pending on direct appeal when *Edwards* was decided.
(A-9)

Thus, quite literally by the narrowest of margins, the case herein was not "final" as this Court has interpeted that term as of the date the *Edwards* decision was issued.

The instant case thus squarely falls within the question which was expressly left open in *Solem v. Stumes,* i.e., the extent, if any, to which *Edwards* is retroactive. In *Stumes,* this Court stated:

> Weighing these considerations, we conclude that *Edwards* should not be applied retroactively.
>
> At a minimum, nonretroactivity means that a decision is not to be applied in collateral review of final convictions. *For purposes of this case, that is all we need decide about Edwards.* Our prior cases have drawn the nonretroactivity line in a variety of places. Some decisions have been applied only to defendants whose convictions were not yet final when the new rule was established, *United States v. Johnson,* 457 U.S. 537 (1982); *Linkletter v. United States,* 381 U.S. 618 (1965), some only to those defendants whose trials had not yet bejun at that point, *Johnson v. New Jersey,* 384 U.S. 719 (1966); *DeStefano v. Woods,* 392 U.S. 631 (1968), some only to those whose constitutional rights were violated after the law-changing decision was handed down, *United States v. Peltier,* 422 U.S. 531 (1975); *Desist v. United States,* 394 U.S. 244 (1969); *Stoval v. Denno,* 388 U.S. 293 (1967), and some only to those cases where the prosecution sought to introduce (newly) illegal evidence after the date of the nonretro-

> active decision, *Fuller v. Alaska,* 393 U.S. 80 (1968). *Just where the line should be drawn as to Edwards need not be decided today.* _____U.S._____ , 52 U.S.L.W. at 4310-4311 (emphasis added) (footnote omitted).

Petitioner respectfully submits that the prophylactic rule fashioned in *Edwards* should only be applicable to violations occurring as of the date of its issuance. As this Court cogently observed in *Solem v. Stumes, supra,* "[i]t would be unreasonable to expect law enforcement authorities to have conducted themselves in accordance with *(Edwards)* bright line rule prior to its announcement; and retroactive application would disrupt the administration of justice." _____U.S._____ , 52 U.S.L.W. at 4310. Such observations could not more clearly apply to the instant case. It has never been so much as suggested that the police chief who questioned respondent either failed to tender the warnings mandated by the *Miranda* decision or failed to obtain a knowing, voluntary and intellegent waiver of such rights as required pursuant to *Johnson v. Zerbst, supra,* prior to any questioning. Moreover, the two (2) wholly exculpatory statements made by respondent were only of utility to the prosecution insofar as they served to further impeach what was the facially implausible trial testimony given by respondent.

As the instant case definitively presents the question expressly left open by this Court in *Solem v. Stumes, supra,* certiorari should be granted to resolve this issue of national importance.

Respectfully submitted,

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APPENDIX

Page

Opinion, November 28, 1983,
United States Court of Appeals for the Sixth Circuit, Rose v. Engle, 722 F. 2d 1277 (6th Cir. 1983) A-1

Order, January 26, 1984,
United States Court of Appeals for the Sixth Circuit, denying petition for rehearing and rehearing en banc A-14

Opinion and Order, December 29, 1982,
United States District Court for the Southern District of Ohio, Eastern Division granting petition for writ of habeas corpus A-15

Decision, August 27, 1980,
Ohio Court of Appeals for the First Judicial District, affirming the trial court judgment A-29

No. 83-3051
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES E. ROSE,
Petitioner-Appellee,

v.

TED ENGLE, SUPERINTENDENT,
Respondent-Appellant.

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed November 28, 1983

Before: MARTIN and WELLFORD, Circuit Judges; and PECK, Senior Circuit Judge.

The Court delivered a per curiam opinion. Judge WELLFORD, Circuit Judge (pp. 10-11) delivered a separate dissenting opinion.

PER CURIAM. The principal question presented in this appeal is whether the Supreme Court's decision in *Edwards v. Arizona,* 451 U.S. 477 (1981), should be applied retroactively.[1] Because we find that the district court correctly held that *Edwards* should be applied

[1]The Supreme Court has granted certiorari to consider the question of the retroactivity of *Edwards. Solem v. Stumes,* 51 U.S.L.W. 3929 (U.S. July 6, 1983) (No. 81-2149).

retroactively to this case, we affirm the district court's judgment granting Charles E. Rose's petition for writ of habeas corpus.

I.

On the morning of December 2, 1978, Rose quarreled with his wife, Jewell. The Roses had a history of marital disputes. At approximately 4:00 p.m. that afternoon, Rose purchased a .22 revolver and fifty rounds of ammunition. Rose told the sales clerk, "You must think I'm going to shoot someone." Approximately twenty minutes later, a neighbor of the Roses called the Franklin, Ohio police department and reported a shooting incident at the Roses' residence. When police arrived, they found Jewell's body lying in the doorway of the residence. At about the same time, neighbors saw Rose carrying a gun in the alley next to the residence. Rose went to a neighbor's house and made several remarks. One witness testified that Rose said, "Sandy go check on her. If she's hurt bad, I have a murder rap." Another witness testified that Rose said, "Sandy you got to hide me. I just shot my wife" and that if Jewell was dead, he would take a murder rap. Two other witnesses testified that Rose said he accidentally shot his wife. Rose was arrested at the neighbor's house where he told the arresting officer that he had shot his wife.

At the police station, Rose, after being advised of his rights under *Miranda v. Arizona,* 384 U.S. 436 (1966), requested an attorney and stated that he did not wish to discuss the incident. The police did not then interrogate Rose. Less than two hours later, Franklin Police Chief George Hamilton, after again advising Rose of his *Miranda*

rights, asked him about the shooting. Rose gave two conflicting stories. First, Rose claimed that Jewell had shot herself. Then, in response to Chief Hamilton's statement that two shots had been fired, Rose claimed that he had argued with Jewell and the gun fired during a struggle over the gun. Rose also said that he would tell the truth if allowed to go home.

Rose was indicted on the charge of aggravated murder, Ohio Rev. Code Section 2903.01(A), in January, 1979. Rose was tried before a jury in May, 1979. The principal issue at trial was whether Rose intentionally or accidentally shot and killed Jewell. At trial, Rose moved to suppress evidence concerning his statements to Chief Hamilton. The trial court denied the motion. Rose was convicted of the lesser included offense of murder, Ohio Rev. Code Section 2903.02(A). Rose was sentenced to imprisonment for a term of fifteen years to life.

Rose appealed his conviction on the ground, among others, that his statements to Chief Hamilton were elicited in violation of his Fifth Amendment rights outlined in *Miranda*. In an opinion relying on *Michigan v. Mosley*, 423 U.S. 96 (1975), the state court of appeals rejected Rose's argument and affirmed his conviction. *State v. Rose*, No. 382 (Warren Cty. Ct. App. Aug. 27, 1980). Rose then filed an appeal to the Supreme Court of Ohio. On March 18, 1981, the Supreme Court of Ohio, sua sponte, dismissed Rose's appeal. *State v. Rose*, No. 80-1488 (Ohio March 18, 1981). On May 18, 1981, the United States Supreme Court announced its decision in *Edwards* which held "that once a suspect invokes his right to counsel, he may not be subjected to further interrogation until counsel is provided unless the suspect himself initiates dialogue with the authorities."

Wyrick v. Fields, 103 S. Ct. 394, 395 (1982) (per curiam) (construing *Edwards*).

On December 10, 1981, Rose filed the instant petition for writ of habeas corpus, pursuant to 28 U.S.C. Section 2254. In an opinion and order dated December 29, 1982, the district court granted the petition based on its conclusions that Rose's statements to Hamilton were inadmissible under *Edwards* and *Miranda,* that *Edwards* is to be applied retroactively to this case, and that admission of the statements was not harmless error. The state has appealed on the grounds that *Edwards* should not be applied retroactively to this case and that the admission of evidence of Rose's statements to Chief Hamilton was harmless error. The state has not disputed the applicability of *Edwards* to this case.

II.

The state presents alternative arguments for the non-retroactive application of *Edwards.* The state argues that because *Edwards* effected a "clear break" from settled precedent by creating an unanticipated per se rule with respect to the waiver of the Fifth Amendment right to counsel during custodial interrogation, under the principles enunciated in *United States v. Johnson,* 102 S. Ct. 2579 (1982), *Edwards* should be applied prospectively only. The state alternatively argues that if *Edwards* is not a "clear break" with settled precedent, *Johnson* directs that *Edwards* be applied retroactively to cases still pending when *Edwards* was decided. Because the state contends that Rose's case was final when *Edwards* was announced, it concludes that *Edwards* does not apply retroactively to the case.

Rose's argument in response is that *Johnson* is inapplicable to *Edwards* because *Johnson,* by its very terms, is limited to decisions construing the Fourth Amendment. Rose continues that even under the principles outlined in *Johnson, Edwards* should be applied retroactively because *Edwards* does nothing more than reaffirm *Miranda's* holding that "[i] f the individual states that he wants an attorney, the interrogation must cease until an attorney is present." 384 U.S. at 474.

The threshhold issue to be resolved is whether the principles enunciated in *Johnson* to determine the retroactivity of decisions construing the Fourth Amendment are to be applied to determine the retroactivity of *Edwards.* In *Johnson,* the Supreme Court held that *Payton v. New York,* 445 U.S. 573 (1980), in which the Court held that the Fourth Amendment prohibits a warrantless and nonconsensual entry into a suspect's home to make a routine felony arrest, is to be applied retroactively to all convictions not final at the time it was decided. In reaching this holding, the Supreme Court stated that three principles concerning retroactivity had been established: (1) when a Supreme Court decision merely applies settled precedent to new and different factual situations, the decision is applied retroactively; (2) when a Supreme Court decision establishes a rule of criminal procedure that is a "clear break with the past", the decision is not retroactive; and (3) when a Supreme Court decision rules that a trial court lacked the authority to convict or punish a criminal defendant, the decision is retroactive. The Court held that none of these principles applied because *Payton* besides not affecting the trial court's authority was neither a mere application of settled precedent to new situations nor a "clear break with the past". The Court then adopted a fourth principle

that had been proposed by Justice Harlan, *Desist v. United States,* 394 U.S. 244, 258 (1969) (Harlan, J. dissenting), *viz.,* that where the Court's decision is not controlled by one of the preceding three principles, the holding of the Court will be applied "to all those cases which are still subject to direct review by this Court at the time the 'new' decision is handed down."[2]

We hold that the principles enunciated in *Johnson* may be used to determine the retroactivity of *Edwards.* Although in announcing its decision in *Johnson* the Court stated that "we express no view on the retroactive application of decisions construing any constitutional provision other than the Fourth Amendment", 102 S. Ct. at 2594 (footnote omitted), in reaching that decision the Court relied on a survey of its decisions determining the retroactive application of decisions construing constitutional provisions other than the Fourth Amendment. *E.g., id.* at 2587 (citing *Gosa v. Mayden,* 413 U.S. 665, 672-73 (1973) (plurality opinion) (no retroactive application of Fifth and Sixth Amendments ruling in *O'Callahan v. Parker,* 395 U.S. 258 (1969))); *id.* (citing *Michigan v. Payne,* 412 U.S. 47, 55-57 (1973) (no retroactive application of Fifth Amendment ruling in *North Carolina v. Pearce,* 395 U.S. 711 (1969))); *id.* at 2588 (citing *Ashe v. Swenson,* 397 U.S. 436, 437 n.1 (1970) (retroactive application of Fifth Amendment ruling in *Benton v.*

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[2]The Court intimated that a fifth principle is well-settled, *viz.,* that where the purpose of a decision "is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function", the decision should be given complete retroactive effect. *Johnson, supra,* 102 S. Ct. at 2594 n.21 (citing *Hankerson v. North Carolina,* 432 U.S. 233 (1977); *Ivan V. v. City of New York,* 407 U.S. 203 (1972)). This principle does not appear to be relevant to the issue of the retroactivity of *Edwards.*

Maryland, 395 U.S. 784 (1969))). Moreover, the principles for determining the retroactivity of decisions construing the Fourth Amendment have regularly been applied in determining the retroactivity of decisions construing the Fifth Amendment. *E.g., Tehan v. United States ex rel. Schott,* 382 U.S. 406 (1966) (applying the retroactivity analysis of *Linkletter v. Walker,* 381 U.S. 618 (1965)). Finally, we can discern no principled basis for declining to apply the *Johnson* analysis of retroactivity to a decision construing the Fifth Amendment. *Accord Ladd v. State,* 664 P.2d 178 (Alaska App. 1983) (applying *Johnson* analysis to issue of retroactivity of *Edwards*).[3]

Applying the principles enunciated in *Johnson* to the issue of the retroactivity of *Edwards,* we hold the state's argument that *Edwards* should be applied prospectively only because it is a "clear break" from settled precedent to be without merit. In *Johnson,* the Court held that a ruling constitutes a "clear break" only if it explicitly overrules a past precedent, disapproves a practice arguably sanctioned by the Court, or overturns a longstanding and widespread practice which a near-unanimous body of lower court authority has expressly approved and which has not been considered by the Court.

Edwards did none of these. *Edwards* did not expressly overrule any precedent. After outlining the holdings of *Miranda* and its progeny, the Court in *Edwards* stated, "We reconfirm these views and, to lend them substance, emphasize that it is inconsistent with

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[3] In *Johnson,* the Court took considerable pains to harmonize the principles enunciated therein with previous decisions analyzing retroactivity. *Johnson, supra,* 102 S. Ct. at 2594 n.21.

Miranda and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." 451 U.S. at 485. *See also Oregon v. Bradshaw,* 103 S. Ct. 2830, 2837 n.2. (1983) (Powell, J., concurring) (arguing that *Edwards* does not alter waiver analysis except as to emphasis of prosecution's burden where critical question is propriety of police communication with suspect); *id.* at 2839 (Marshall, J., dissenting) (referring to safeguards created by *Miranda* and *Edwards*). Nor did *Edwards* disapprove a practice previously sanctioned by the Court. To the extent that the Court had considered the continued interrogation of a suspect who had requested the assistance of counsel, the Court had expressed its disapproval. *See Michigan v. Mosley, supra,* 423 U.S. at 104 n.10; *Fare v. Michael C.,* 442 U.S. 707, 719 (1979); *Rhode Island v. Innis,* 446 U.S. 291, 298 (1980). Finally, *Edwards* did not overturn a long-standing practice that had been approved by a near-unanimous body of lower court authority. Of particular relevance is that *Edwards* did not alter Sixth Circuit law substantially, but rather confirmed the practice of this court. *See Maglio v. Jago,* 580 F.2d 202, 205-06 (6th Cir. 1978); *Combs v. Wingo,* 465 F.2d 96, 98-99 (6th Cir. 1972).[4] Accordingly, *Edwards* "does not fall into that narrow class of decisions whose nonretroactivity is effectively preordained because they unmistakably signal 'a clear break with the past'. . . ." *Johnson, supra,* 102 S. Ct. at 2589-90 (quoting *Desist v. United States, supra,* 394 U.S. at 248).

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[4] *Accord Nash v. Estelle,* 597 F.2d 513 (5th Cir.) (en banc), *cert. denied,* 444 U.S. 981 (1979). *Contra United States v. Rodriguez-Gastelum,* 569 F.2d 482 (9th Cir.) (en banc), *cert denied,* 436 U.S. 919 (1978).

The state's alternative argument that *Edwards* is inapplicable to this case because *Edwards* applies retroactively only to those cases not yet final when *Edwards* was decided is similarly unavailing because on May 18, 1981, when *Edwards* was decided, Rose's case was still pending on direct appeal. As the Supreme Court noted in *Johnson*,

> "By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed [or a petition for certiorari finally denied, all] before our decision in *Mapp v. Ohio.*" *Linkletter v. Walker,* 381 U.S. at 622, n.5. See also *Tehan v. United States ex rel. Schott,* 382 U.S. 406, 409, n.3 (1966).

102 S. Ct. at 2583 n.8. (emphasis added; alteration of quotation in original). Rose's appeal was dismissed by the Supreme Court of Ohio on March 18, 1981. Rose had sixty days from that date to file apetition for certiorari. Sup. Ct. R. 20; 28 U.S.C. Section 2101 (1976). Because the sixtieth day from March 18, 1982 was a Sunday, May 17, 1981, the period for Rose's filing a petition for certiorari did not elapse until the end of the next day, May 18, 1981. Sup. Ct. R. 29. On May 18, 1981, *Edwards* was decided by the Supreme Court and, accordingly, Rose's case was still pending on direct appeal when *Edwards* was decided.

Because of our finding that Rose's conviction was not final when *Edwards* was decided, we need not decide whether *Edwards* merely applied settled legal principles to a new factual situation, because under the principles

enunciated in *Johnson, Edwards* applies retroactively to Rose's case regardless of the resolution of this issue. We do note, however, that the majority of courts that have considered the issue has applied *Edwards* retroactively[5] and that a panel of this court without explicitly addressing the issue has applied *Edwards* retroactively.[6]

The state also contends that admission of evidence of Rose's statements to Chief Hamilton was harmless error. *Chapman v. California,* 386 U.S. 18 (1967). For a court to find that admission of the evidence was harmless error, "the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24.

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[5] *United States v. Scalf,* 708 F.2d 1540 (10th Cir. 1983) (per curiam); *United States ex rel. Kimes v. Greer,* 541 F. Supp. 632 (N.D. Ill. 1982), *aff'g on rehearing,* 527 F. Supp. 307 (N.D. Ill. 1981); *People v. Paintman,* 315 N.W.2d 418 (Mich.), *cert. denied,* 456 U.S. 995 (1982); *State v. Brown,* 317 N.W.2d 714 (Minn. 1982), *cert. denied,* 51 U.S.L.W. 3938 (U.S. July 6, 1983) (No. 82-1); *State v. Taylor,* 643 P.2d 379 (Ore. App. 1982); *State v. Price,* 330 N.W.2d 779 (Wis. App.), *appeal denied,* 333 N.W.2d 729 (Wis. 1983). *Contra State v. Shea,* 421 So. 2d 200 (La. 1982); *State v. McCloskey,* 446 A.2d 1201 (N.J. 1982). *See also Ladd v. State,* 664 P.2d 178 (Alaska App. 1983) (declining to decide whether *Edwards* merely application of *Fare v. Michael C., supra,* or *Rhode Island v. Innis, supra,* but holding that *Edwards* is change of law from *Miranda*).

[6] *Clark v. Jago,* 676 F.2d 1099 (6th Cir. 1982), *petition for cert. filed,* 51 U.S.L.W. 3443 (U.S. Nov. 19, 1982) (No. 82-859). Several other circuits have applied *Edwards* retroactively without expressly considering the issue. *E.g., United States v. Hinckley,* 672 F.2d 115 (D.C. Cir. 1982) (per curiam) (direct appeal); *United States v. Downing,* 665 F.2d 404 (1st Cir. 1981) (direct appeal); *Silva v. Estelle,* 672 F.2d 457 (5th Cir. 1982) (habeas corpus); *White v. Finkbeiner,* 687 F.2d 885 (7th Cir. 1982) (habeas relief), *petition for cert. filed,* 51 U.S.L.W. 3001 (U.S. June 18, 1982) (No. 81-2340).

Based on our review of the trial record, we cannot declare that the error of admitting evidence of Rose's statements to Chief Hamilton was harmless beyond a reasonable doubt. As the district court correctly found, "[t]he principal issue of the case was whether [Rose] shot his wife purposely or accidentally." App. at 91. There were, apart from Rose, no eyewitnesses to the shooting. The prosecution's case was built on the circumstances of the shooting: the Roses' history of marital disputes; the Roses' marital dispute on the morning of the shooting; Rose's purchase of the gun only a short time before the shooting; Rose's statements to neighbors following the shooting; and Rose's statements to Chief Hamilton. Rose's defense was based principally on Rose's account of the shooting. In this context, Chief Hamilton's testimony concerning Rose's contradictory versions of the shooting may well have affected the jury's decision.[7]

For the foregoing reasons, the judgment of the district court is affirmed.

WELLFORD, Circuit Judge, dissenting. Apart from the question as to whether *Edwards v. Arizona,* 451 U.S. 477 (1981), should be applied retroactively, I am convinced that admission of defendant's statements constituted harmless error under *Chapman v. California,* 386 U.S. 18 (1967). I therefore dissent.

Defendant's contention at trial was that he shot his wife accidentally while unloading his gun. One need not even consider the contested statements to recognize the

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[7] In reaching this decision we note the emphasis placed on Rose's statements to Chief Hamilton by the prosecution in closing argument. Trial transcript at 535-37.

implausibility of defendant's story. Less than a half hour before his wife's death, defendant purchased the weapon and ammunition with which she was killed, and made a remark which may have been taken to indicate he was thinking about killing someone. He claimed to have loaded the gun in his car when he arrived home. Before shooting his wife, defendant fired a shot through the floorboard of his car. The state argued that the shot in the car was a "test shot"; defendant maintained that the first shot occurred accidentally, while he was loading the gun. To believe defendant's story therefore requires that one believe that, within a short time after purchasing a gun, defendant accidentally fired the gun twice; it further requires that one believe that defendant, shortly after accidentally discharging the gun while loading it, nevertheless unloaded the gun while pointing it at his wife's heart from a distance of four feet. Given this remarkable defense theory, admission of the contested statements here was harmless beyond a reasonable doubt.

Furthermore, the procedural posture of this case seems to support the conclusion that any error here was harmless. Because defendant testified, the district court found that the contested statements would have been admissible for impeachment purposes even if obtained unconstitutionally; defendant did not dispute that conclusion. Despite this conclusion, the district court issued the writ of habeas corpus, noting that the statements, while admissible for impeachment, were not admissible for the truth of the matter asserted. That distinction, however, is of no significance in this case. The contested statements here were intended to be exculpatory: if either had been believed, or if they created a reasonable doubt, defendant could not have

been convicted of intentionally killing his wife. Because the statements were supposedly exculpatory, their only possible use was for impeachment; any error in admitting them here was harmless, even if *Edwards* is applicable.

Accordingly, I would reverse the district court's grant of habeas corpus relief.

No. 83-3051

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES E. ROSE,
Petitioner-Appellee,

v.

TED ENGLE, SUPERINTENDENT,
Respondent-Appellant.

ORDER

Filed January 26, 1984

BEFORE: MARTIN and WELLFORD, Circuit Judges; and PECK, Senior Circuit Judge.

The court not having voted in favor of a rehearing en banc, the petition for rehearing heretofore filed by the respondent has been referred to the panel which heard the appeal.

Upon consideration, the court concludes that the issues raised in the petition for rehearing were fully considered upon the original submission and decision of the appeal. Accordingly, the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CHARLES E. ROSE
Petitioner

vs.

TED ENGLE, Supt.
Respondent

Civil Action C-2-81-1470

file stamp omitted

OPINION AND ORDER

Petitioner, a state prisoner, brings this action for a writ of habeas corpus under 28 U.S.C. Section 2254. This matter is before the Court on the petition, return of writ, transcript of proceedings in *State v. Rose,* Case No. 80831 (Warren Cty. C.P. Ct. May, 1979), and the briefs and exhibits of the parties.

Petitioner was indicted by the January, 1979 Term Warren County, Ohio Grand Jury for aggravated murder in violation of R.C. Section 2903.01(A). He was tried to a jury which found him guilty of the lesser included offense of murder in violation of R.C. Section 2903.02. The trial judge sentenced him to a term of fifteen (15) years to life imprisonment.

Petitioner appealed his conviction to the Court of Appeals for the First Appellate District alleging three assignments of error. The appellate court affirmed the judgment of conviction. He appealed to the Supreme Court of Ohio which dismissed his appeal for want of a substantial constitutional question.

Petitioner alleges that he is in custody in violation of the United States Constitution because he was denied his right to have counsel present during a custodial interrogation. He asserts that when he was informed of his *Miranda* rights, he stated that he did not wish to talk until he had spoken to an attorney. Less than two hours later, he was interrogated by another police officer, Chief Hamilton, who elicited inculpatory statements from him which were later used against him at trial.

From the testimony, it appears that petitioner was arrested at 4:30 p.m. on December 2, 1978 at the scene of the shooting by Officer Pressler, a police officer for the City of Franklin. Officer Pressler took him to the police station and read him his *Miranda* warnings. The officer testified that when he advised petitioner of his right to have an attorney present, ". . . he [petitioner] stated to me he did not want to talk to me at that time until he had an attorney."

At 6:25 p.m., George Hamilton, III, Chief of Police for the City of Franklin, had petitioner brought into his office for questioning. He again advised petitioner of his *Miranda* rights and petitioner signed a card stating those rights. Chief Hamilton then proceeded to interrogate petitioner and obtained conflicting versions of the shooting which were used against petitioner at trial. He terminated the interview at 6:55 p.m. when petitioner's

counsel called. Chief Hamilton testified in the suppression hearing that he was aware that Office Pressler had advised petitioner of his rights, but he was not aware of petitioner's response. He also knew that petitioner hadn't made any statements to Officer Pressler, but he didn't know why petitioner had made no statement. Finally, Chief Hamilton testified that he was not aware that petitioner had asked for an attorney.

On the basis of the above evidence, the trial judge ruled:

> . . . I cannot say as a matter of law that the defendant's constitutional rights were violated in regards to the second interrogation, although the Court has expressed its personal opinion about police practices circumventing constitutional rights.
>
> The law in Ohio is very clear. The possible *Miranda* interrogation by another officer after refusal is permissible and is so in this case and Chief Hamilton may testify in that regard.

The Court of Appeals affirmed the trial court ruling reasoning that *Miranda v. Arizona,* 384 U.S. 436 (1966) did not establish a *per se* rule excluding the admission of statements made during custodial interrogations of a defendant after he asserted his right to counsel. They relied upon *Michigan v. Mosley,* 423 U.S. 96, 104 (1975) in which the United States Supreme Court stated:

> Admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on

whether his right to cut off questioning was scrupulously honored.

The Court of Appeals discussed the facts as follows:

> Upon examination of the record in the instant cause, we are convinced that the police officers who questioned the appellant after his arrest displayed the necessary scrupulous regard for his constitutional rights. When the appellant first indicated upon his arrival at the station house that he would not speak at that time without the assistance of counsel, it is uncontroverted that the officer who had earlier read him his rights immediately cut off any dialogue which could have been construed as an interrogation, and confined the appellant to a jail cell. It was not until approximately ninety minutes later that the appellant was next confronted by a second law enforcement official.
>
> At that time, he was taken into a room where he sat without direct physical restraint in a chair directly across a desk from the Franklin, Ohio Chief of Police. The Chief testified that the appellant spoke coherently, and was without any apparent physical or mental disability. In addition, there is nothing in the record to suggest that the appellant was then acting under any shadow of threat or that he was otherwise motivated by any form

of inducement. After the Chief had again advised the appellant of his *Miranda* rights and the appellant had indicated that he understood them, the appellant signed the waiver form and proceeded to make the inculpatory statements without any mention of exercising his right to counsel. Under such circumstances, we cannot say that the conduct of the police officers was in derogation of the appellant's constitutional rights.

It is thus our view that disposition of the instant cause is not controlled by our prior decision in *Korn, supra.* A careful reading of the facts in *Korn* discloses that the defendant in that case was subjected over a period of several days following his arrest to a series of custodial interrogations during which he repeatedly attempted to invoke his right to the assistance of counsel. During that time, it was apparent that some of the interrogation sessions were commenced either without the issuance of *Miranda* warnings or by a defective recitation of those warnings. It was further clear that the interrogating officers engaged in forms of harassment and deception which served only to heighten the coercive atmosphere leading to the defendant's confession. Given such circumstances, this Court concluded that "the confession of guilt . . . should have been suppressed since it followed custodial interrogations held in

disregard of [the defendant's] election to have the assistance of counsel." *Korn, supra,* at 16. On the basis of the facts as set forth above, however, the case is clearly distinguishable from the situation confronting us in the instant cause.

We are similarly unpersuaded by the appellant's contention that the State failed to demonstrate at trial that he had manifested a waiver of his relevant constitutional rights before making the statements to the police officer. In light of the appellant's execution of the waiver form and the other circumstances attendant to his interrogation which are described above, we are convinced that the judge presiding at trial was entitled to conclude that he had, in fact, knowingly and voluntarily waived his *Miranda* rights upon an independent and rational reassessment of his interests.[6] See, *North Carolina v. Butler* (1979), _____U.S. _____ , 99 S.Ct. 1755; *Brewer v. Williams* (1977), 430 U.S. 387, 97 S.Ct. 1232, *State v. Scott* (1980), 61 Ohio St. 2d 155, _____N.E. 2d_____ ; *State v. Reese,* No. C-2-79-596, unreported (1st Dist. 1980).

In *Miranda,* the United States Supreme Court stated:

If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant

> knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.

Id. at 475. The Supreme Court further held:

> If the individual states that he wants an attorney, *the interrogation must cease until an attorney is present.* At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning.

384 U.S. at 474 (emphasis added).

In *Michigan v. Mosley,* 423 U.S. 96 (1975), the Supreme Court dealt with the situation where a defendant asserted his right to remain silent but did not request to consult an attorney. He was later questioned by law enforcement officers. The Court rejected a "*per se* proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent." 423 U.S. a 102-103. However, the Court noted in a footnote that *Miranda*

> . . . distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and directed that 'the interrogation must cease until an attorney is present' only '[i]f the individual states that he wants an attorney.'

Id. at 104, n. 10. The clear implication is that *Michigan v. Mosley, supra* does not apply if the accused asserted his right to counsel. In the present case, petitioner requested counsel, and hence, *Michigan v. Mosley, supra* is inapplicable.

Consequently, the Ohio Court of Appeals's decision, relying on *Mosley,* that petitioner waived his *Miranda* right to counsel was based upon an incorrect application of a constitutional standard. Thus, the Court of Appeals's finding that petitioner's confession was voluntary is entitled to no weight in the present proceedings. *See, Edwards v. Arizona,* 451 U.S. at 482; *Brewer v. Williams,* 430 U.S. 387, 404 (1977); *Faretta v. California,* 422 U.S. 806, 835 (1975); *Johnson v. Zerbst,* 304 U.S. 458 (1938).

While in the present case it is arguable that petitioner's Sixth Amendment right to the appointment of counsel had not yet accrued because there is no evidence a formal charge had been filed against him and he had not yet appeared before a judicial officer, see, *Brewer v. Williams,* 430 U.S. at 398; *Clark v. Jago,* 676 F.2d 99, 1111 at n. 16 (6th Cir. 1982), under *Miranda* he had a right--which he exercised--to an attorney prior to any questioning. See, *Edwards v. Arizona,* 451 U.S. at 484-485.[1] Several decisions following *Miranda* have made it

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[1] The Court is cognizant of the fact that *Edwards v. Arizona, supra* was decided after petitioner's trial and that one judge of the United States Court of Appeals for the Sixth Circuit intimated in dicta that he did not believe that *Edwards* would apply retroactively. *United States v. Holliday,* _____F.2d_____, (6th Cir. 1981) (slip opinion, p. 3 n. 1). Nonetheless, this Court is of the opinion that *Edwards* does not represent a change in the law as enunciated in *Miranda.* The Eighth Circuit in *Stumes v. Solem,* 671 F.2d 1150, 1155-1158 (8th Cir.) applied *Edwards* retroactively.

clear that custodial interrogation must cease as soon as a suspect invokes his right to counsel. *Combs v. Wingo,* 465 F.2d 96 (6th Cir. 1972); *Thompson v. Wainwright,* 601 F.2d 768 (5th Cir., 1979); *United States v. Massey,* 550 F.2d 300 (5th Cir. 1977); *McKeamer v. United States,* 32 Crim L. Rptr. 2163, 2164 (D.C. Ct. App. October 27, 1982). However, at least one circuit has rejected a *per se* rule that excludes all statements made by an accused after he has asserted his right to counsel. *United States v. Rodriquez-Gostelum,* 569 F.2d 482 (9th Cir.), *cert. denied,* 436 U.S. 919 (1978). In its most recent decision on this subject, the United States Court of Appeals for the Sixth Circuit held that:

> The burden is on the State to establish waiver in every case in which it seeks to introduce a statement taken without presence of counsel. That burden becomes far more difficult, if not impossible, to sustain when the record shows that a request for counsel was made which was not honored before questioning continued.

Maglio v. Jago, 580 F.2d 202, 205 (6th Cir. 1978).

In *Edwards v. Arizona, supra,* the Supreme Court considered the issue squarely presented in the instant case: When may an accused be interrogated in custody after he has invoked his right to counsel? First, the Court held that,

> . . . waivers of counsel must not only be voluntary, but constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege . . .

451 U.S. at 483. The Court continued,

> . . . we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication exchanges or conversations with the police.

451 U.S. at 484-485.

Applying the above standard to the present case, the Court concludes that petitioner's right to counsel under *Miranda* was violated since he invoked his right to have counsel present during questioning, and shortly thereafter, interrogation was resumed without counsel present. Counsel was not made available to him, and petitioner did not initiate the second interrogation. Moreover, it is clear that the police did not "scrupulously honor" his request for an attorney. Less than two hours after he requested counsel, he was subjected to an interrogation without an attorney present. Furthermore, the fact that petitioner signed a card that had the *Miranda* warnings displayed on it is insufficient to meet the government's heavy burden of showing a waiver of the right to counsel.

Maglio v. Jago, supra. Under these circumstances, the Court HOLDS that petitioner's right to have counsel present during a custodial interrogation was violated. *See, McKeamer v. United States,* 32 Crim. L. Rptr. at 2164.

Although there was a *Miranda* violation, the Court must still determine whether the admission at trial of the statements taken contrary to *Miranda* constitutes harmless error. *Milton v. Wainwright,* 407 U.S. 372 (1972); *United States v. Charlton,* 565 F.2d 86, 92 (6th Cir. 1977), *cert. denied sub. nom. Jacek v. United States,* 434 U.S. 1070 (1978); *Chapman v. California,* 386 U.S. 18, 23-24 (1967). The United States Supreme Court held in *Chapman v. California,* 386 U.S. at 24 that,

> . . . before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.

A short review of the evidence is necessary to resolve this issue. Petitioner was tried for murdering his wife on the afternoon of December 2, 1978. The victim died as a result of a single bullet wound in the chest, and the bullet was ballistically shown to have been fired from a gun that petitioner purchased on the day of the shooting. The shot was fired from a range of about 4 feet. The principal issue of the case was whether petitioner shot his wife purposely or accidentally.

After the shooting, petitioner went to Charles Stephens' house and made comments heard by Mr. Stephens, his wife Sandra Stephens, and Mrs. Stephens's

two sisters, Verla Raney and Phyllis Raney. Mr. Stephens testified that he was sleeping before petitioner came to his house, but he awoke and heard petitioner say, "Sandy, go check on her. If she's hurt bad, I have a murder rap." Sandra Stephens testified petitioner stated that he accidentally shot his wife and that he asked her and her sisters to go check on his wife. Verla Raney testified that when petitioner entered the house, he said, "Sandy, you got to hide me. I just shot my wife." She also recalled his later statement that "[i]f she was dead, he would take a murder rap." Phyllis Raney testified that petitioner said he accidentally shot his wife.

Officer Ronald Pressler testified that he arrived at the scene and discovered the victim laying against the storm door. He proceeded to the Stephens' home where he found petitioner who stated to him that he shot his wife. Dr. Paul Jolly, a deputy coroner, ascertained that the victim died of a bullet wound to the heart which also passed through her lungs. Finally, the prosecution presented evidence that petitioner purchased the murder weapon on the day of the shooting.

The defense case rested primarily on the testimony of the petitioner. He testified that on the day of the homicide, he did not go to work because his stomach felt bad. That morning, petitioner testified, his wife "seemed like she was upset or a little mad about something." She "took some clothes out of our closet and went and put them in the back seat of the car." Petitioner asked her to go shopping with him, and she declined. Around noon he left the house to do some shopping. While shopping he went to a Western Auto

Store where he purchased a gun for target practice.[2] When he purchased the gun, he was not given any instructions on how to use it. Petitioner testified that he did have prior experience with guns, including handguns, but he couldn't remember the caliber of the handguns. He drove home, and, in his driveway, he decided to load the gun to see how it worked. He cocked the gun, then began loading it, and he accidentally fired a shot which went through the floorboard of his car. Next, he took the gun into the house, and laid it on a table. His wife came into the room and sat across from him. She asked him where he got the gun and told him he should put it away before he got hurt. Petitioner further testified that he then cocked the gun preparatory to unloading it when it fired killing his wife. He ran to a neighbor's house and told them to call the emergency squad because he accidentally shot his wife.

Within this context, the Court must consider the impact of Chief Hamilton's testimony regarding petitioner's statements to him. Chief Hamilton testified that petitioner initially told him that his wife shot herself but when he, Chief Hamilton, confronted petitioner with the fact that two rounds were fired from the gun, he changed his story. Then petitioner said that there was an argument and a struggle over the gun during which he shot his wife. His final comment was, "If you let me go home, I'll tell you the truth."

---

[2]Petitioner testified that he went to the Western Auto store twice. Once around noon, and the second time was between 3:00 and 3:30 p.m. He purchased the gun on the second trip. The homicide occurred about 4:00 p.m.

The Court concludes that the admission of Chief Hamilton's testimony was not harmless error. The key issue in the case was whether the shooting was accidental. There were no eyewitnesses to the shooting and the testimony concerning petitioner's statements after the shooting were conflicting. On these facts, the introduction of the contradictory versions of the shooting petitioner gave Chief Hamilton might have decisively influenced the jury. And while petitioner's comments could have been used to impeach him as a witness, they were not admissible for the truth of the matter stated in the prosecutor's case-in-chief, because they were obtained in violation of *Miranda*.

WHEREUPON, the Court HOLDS that the petition is meritorious; and, therefore, it is GRANTED. The Clerk of Court shall enter JUDGMENT for petitioner.

The writ of habeas corpus will issue sixty (60) days from the date of the filing of this Opinion and Order unless, within such time, the State initiates proceedings to retry petitioner. If a notice of appeal from the judgment entered in this case is filed, the writ of habeas corpus will not issue until sixty (60) days after the appellate court's mandate is filed in this Court.

/s/ Robert M. Duncan
Robert M. Duncan, Judge
United States District Court

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
WARREN COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee,

vs.

CHARLES R. ROSE,
Defendant-Appellant.

NO. 382

DECISION

Filed August 27, 1980

Mr. Morris J. Turkelson, Prosecuting Attorney, Law Building, 313 Warren Street, Lebanon, Ohio 45036, for Plaintiff-Appellee,

Messrs. Holbrock, Jonson, Bressler & Houser, Hugh D. Holbrock and Michael D. Shanks of counsel, 315 South Monument Avenue, Hamilton, Ohio 45011, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas of Warren County, Ohio, the transcript of the proceedings, the assignments of error, and the briefs and oral arguments of counsel.

On May 17, 1979, following a four-day trial in the Court of Common Pleas of Warren County, the defendant-appellant, Charles Rose, was found guilty by a jury of the murder of his wife, Jewell, in violation of R.C. 2903.02. It is from the judgment subsequently entered against him in that court and the sentence imposed thereon[1] that the instant appeal is taken; the appellant has given us three assignments of error for review.

The first of the appellant's three assignments challenges, on constitutional grounds, the admission into evidence of certain statements made by the appellant to the Chief of Police of the Franklin, Ohio, police department during the course of a custodial interrogation initiated after the appellant's arrest.[2] It is argued that such statements should have been excluded at trial because they were given without a waiver in violation of the appellant's rights as defined in *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S. Ct. 1602, and *Michigan v. Mosley* (1975), 423 U.S. 96, 96 S. Ct. 321.

The facts and circumstances attendant to the appellant's interrogation as they were developed in the proceedings below show that the appellant was arrested by an officer of the Franklin, Ohio, police department on the afternoon of December 2, 1978, at approximately 4:30 p.m. The arrest was made at a residence within the immediate vicinity of the scene of the killing for which the appellant was later charged. After being informed by the appellant that he had just shot his wife, the officer transported him to a police station house where the appellant was read his *Miranda* rights. Upon being apprised of his rights, the appellant indicated to the officer that he would not respond to any questions from him until he had an opportunity to retain an attorney.[3]

The appellant was thereupon placed in a jail cell at the station house until approximately 6:25 p.m. on that same day, at which time, he was escorted into an office occupied by the Chief of Police of Franklin, Ohio. Before embarking upon any form of interrogation,[4] the Chief informed the appellant that his wife was dead and that he was being charged with her murder. He also readvised the appellant of his *Miranda* rights, and asked him if he understood them. The appellant replied that he understood his rights, and proceeded to sign a waiver-of-rights form. He then began a patently contradictory explanation of the circumstances surrounding his wife's death, the substance of which he later sought to exclude from evidence at trial.[5]

The appellant's argument that the statements at the station house were obtained in violation of his constitutional rights is bottomed first upon the blanket assertion that any statement made in a custodial setting after the accused has expressed an intent to exercise his right to counsel is constitutionally infirm. In formulating such a rule, he relies primarily on *Miranda v. Arizona, supra,* and *State v. Korn,* No. CA 77-07-0084, unreported (1st Dist. 1979).

Although it is true that *Miranda* contains language tending to support the appellant's argument in support of a *per se* rule, it is equally clear in light of subsequent interpretations of that decision that such a rule has not yet been adopted. See *Michigan v. Mosley* (1975), 423 U.S. 96, 98 S. Ct. 321; *White v. Finkbeiner* (7th Cir. 1979), 611 F.2d 186; *United States v. Rodriquez-Gastelum* (9th Cir. 1978), 569 F.2d 482. *Cf. State v. Black* (1976), 48 Ohio St. 2d 262, 358 N.E.2d 551, vacated and remanded on other grounds, 438 U.S. 910.

In *Mosley, supra,* the Supreme Court of the United States, per Stewart, J., rejected a similar *per se* approach to the resumption of a custodial interrogation after the accused has invoked his right to remain silent by recognizing that such a posture "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests." 423 U.S. at 102. Instead, the Court concluded that:

> "Admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his right to cut off questioning was scrupulously honored." 423 U.S. at 104.

Upon examination of the record in the instant cause, we are convinced that the police officers who questioned the appellant after his arrest displayed the necessary scrupulous regard for his constitutional rights. When the appellant first indicated upon his arrival at the station house that he would not speak at that time without the assistance of counsel, it is uncontroverted that the officer who had earlier read him his rights immediately cut off any dialogue which could have been construed as an interrogation, and confined the appellant to a jail cell. It was not until approximately ninety minutes later that the appellant was next confronted by a second law enforcement official.

At that time, he was taken into a room where he sat without direct physical restraint in a chair directly across a desk from the Franklin, Ohio, Chief of Police. The

Chief testified that the appellant spoke coherently, and was without any apparent physical or mental disability. In addition, there is nothing in the record to suggest that the appellant was then acting under any shadow of threat or that he was otherwise motivated by any form of inducement. After the Chief had again advised the appellant of his *Miranda* rights and the appellant had indicated that he understood them, the appellant signed the waiver form and proceeded to make the inculpatory statements without any mention of exercising his right to counsel. Under such circumstances, we cannot say that the conduct of the police officers was in derogation of the appellant's constitutional rights.

It is thus our view that disposition of the instant cause is not controlled by our prior decision in *Korn, supra.* A careful reading of the facts in *Korn* discloses that the defendant in that case was subjected over a period of several days following his arrest to a series of custodial interrogations during which he repeatedly attempted to invoke his right to the assistance of counsel. During that time, it was apparent that some of the interrogation sessions were commenced either without the issuance of *Miranda* warnings or by a defective recitation of those warnings. It was further clear that the interrogating officers engaged in forms of harassment and deception which served only to heighten the coercive atmosphere leading to the defendant's confession. Given such circumstances, this Court concluded that "the confession of guilt. . .should have been suppressed since it followed custodial interrogations held in disregard of [the defendant's] election to have the assistance of counsel." *Korn, supra,* at 16. On the basis of the facts as set forth above, however, the case is clearly distinguishable from the situation confronting us in the instant cause.

We are similarly unpersuaded by the appellant's contention that the State failed to demonstrate at trial that he had manifested a waiver of his relevant constitutional rights before making the statements to the police officer. In light of the appellant's execution of the waiver form and the other circumstances attendant to his interrogation which are described above, we are convinced that the judge presiding at trial was entitled to conclude that he had, in fact, knowingly and voluntarily waived his *Miranda* rights upon an independent and rational reassessment of his interests.[6] See *North Carolina v. Butler* (1979), _____U.S._____ , 99 S. Ct. 1755; *Brewer v. Williams* (1977), 430 U.S. 387, 97 S. Ct. 1232, *State v. Scott* (1980), 61 Ohio St. 2d 155, _____ N.E.2d_____ ; *State v. Reese,* No. C-790596, unreported (1st Dist. 1980).

The appellant's first assignment of error is, accordingly, without merit.

The appellant next asserts in his second assignment that the finding of guilt upon the charge of murder was against the manifest weight of the evidence adduced at trial. He reasons specifically that the evidence was insufficient as a matter of law to establish that he acted purposely within the meaning of Ohio's murder statute when he fired the shot that resulted in his wife's death.

To act with purpose in this State is to have a specific intention to cause a certain result. R.C. 2901.22(A). Such a mental state must generally be proven at trial by resort to circumstantial evidence especially where, as here, the actor does not specifically state his intentions before undertaking a particular course of conduct. *State v. Johnson* (1978), 56 Ohio St. 2d 35, 381 N.E. 2d 637; *State v. Huffman* (1936), 131 Ohio St. 27, 1 N.E.2d 313.

The appellant, alluding to the rule of *State v. Kulig* (1974), 37 Ohio St. 2d 157, 309 N.E.2d 897, maintains that there was sufficient testimony at trial to raise a reasonable theory of his innocence and, thus, to preclude an adverse finding on the element of intent bottomed only upon circumstantial evidence. He refers us specifically to his own testimony during which he explained to the jury that the gun from which the fatal shot emanated accidentally discharged as he was attempting to unload it.

In *Kulig, supra,* it was held that when circumstantial evidence is relied upon to prove an essential element of irreconciliable an offense, it must be with any reasonable theory of the accused's innocence. The Supreme Court of Ohio has subsequently explained the *Kulig* rule in the following manner:

> "[T]he determination of reasonableness includes a determination of whether the hypothesis is reasonable in view of the weight and credibility that the jury gives to the evidence.
>
> * * *
>
> [O]nce the jury has reached its decision, an appellate court, in a case where circumstantial evidence is relied upon, will reverse only where the evidence is insufficient as a matter of law to enable the jury to exclude a reasonable hypothesis of innocence."[7] *State v. Graven* (1975), 54 Ohio St. 2d 114, 119, 374 N.E.2d 1370, 1373.

Applying the rule to the evidence entered upon the record in the instant cause, we are convinced that the jury was entitled to discard the appellant's hypothesis of an accidental shooting in favor of its finding that he intentionally shot his wife. There was persuasive evidence adduced at trial showing that the victim had ordered the appellant out of their home during a domestic argument on the morning of the day that she was killed. After the argument, she assembled a large quantity of the appellant's clothing and placed it in the back seat of his car.

Several hours later, the appellant walked into a commercial establishment in Franklin, Ohio, known as The Western Auto Store and purchased a .22 caliber revolver as well as a box containing fifty rounds of live ammunition. After making the purchase, he returned to his home and, while sitting in his automobile which was parked in the driveway adjoining the house, he loaded the weapon with eight or nine bullets. He then carried the revolver into the house, and fired from a distance of approximately four feet a single shot which pierced his wife's heart and a part of her left lung.

Such a course of conduct, in our minds, sufficiently manifested an intention to kill the victim. We are further persuaded that the jury was entitled to discredit the appellant's characterization of the shooting as an accidental occurrence in view of its inconsistency with his own earlier statements[8] and of his conceded familiarity with the use of firearms.[9] Accordingly, we conclude that the appellant's second assignment of error is without merit.

The appellant's final assignment of error reads as follows:

> "It was prejudicial error for the trial court to instruct the jury to the effect that the law presumes that a person intends the ordinary consequences of his voluntary acts; such instruction is a violation of the Fourteenth Amendment due process requirement that the State prove every element beyond a reasonable doubt."

At the conclusion of the trial, the judge presiding, while charging the jurors on the offense of murder, gave the following instruction with respect to the element of purpose:

> "[A] person acts purposely when it is his specific intention to cause a certain result. So, it must be established in this case at the time in question there was present in the mind of the defendant a specific intention to kill Jewell Rose.
>
> Purpose is a decision of the mind to do an act with the conscious objective of producing a specific result. To do an act purposely is to do it intentionally and not accidentally.
>
> Purpose and intent mean the same thing. The purpose with which a person does an act is known only to himself unless he expresses it to others or indicates

> it by his conduct. The purpose with which a person does an act or brings about a result is determined by you from the manner in which it is done, the means and the weapon used, and all the other facts and circumstances in evidence." T.p. 583

The judge then repeated the instruction after the jurors had retired for deliberations upon their request that he clarify the distinctions between murder and negligent homicide.[10]

It is our view that the instruction given on the element of intent in the instant cause is not laden with the same fatal defect which was found in *Sandstrom v. Montana* (1979), _____U.S._____ , 99 S. Ct. 2450, the case relied upon by the appellant. In *Sandstrom,* unlike the instant cause, the judge included within his instructions to the jury a statement that "the law presumes that a person intends the ordinary consequences of his voluntary acts." The Court concluded that such an instruction was in violation of the defendant's Fourteenth Amendment rights because the jury may have construed it to establish a conclusive presumption in favor of the prosecution or to shift the burden of persuasion to the defendant.

Here, it is clear, however, that the judge's instructions did not implicate either a shifting burden or a conclusive presumption. The jury was told that the State had the burden of proving each element of the offense beyond a reasonable doubt and that it was their responsibility to assess the evidence for the purpose of establishing whether the State had met its burden on each element, including the element of intent.

The appellant's third assignment of error is without merit.

The judgment of the Court of Common Pleas of Warren County, Ohio, is affirmed.

SHANNON, P. J., KEEFE and CASTLE, J. J.

---

1. The appellant was ordered to pay the costs of his prosecution and to serve an indeterminate term of confinement of fifteen years to life in the Ohio Penitentiary.

2. The appellant failed to file a pretrial motion to suppress the statements despite the fact that he was made aware of them in the State's timely response to his pretrial demand for discovery. He was relieved of the effect of the waiver of error imposed by Crim. R. 12(G), however, when the judge presiding at trial concluded *in medias res* that there had been good cause shown for conducting a supression proceeding at that time.

3. The officer described his encounter with the appellant in the following manner at trial:

> "Well, he was advised that he had the right to have an attorney present and he stated to me he did not want to talk to me at that time until he had an attorney."

4. When questioned by defense counsel on the subject of his awareness of the earlier colloquy between the

arresting officer and the appellant with respect to the appellant's *Miranda* rights, Chief Hamilton indicated only that he had been told that the appellant had not said anything about his wife's death.

5. We note that the appellant implicated himself in the shooting on at least two occasions prior to his making of the custodial statements. He told a neighbor immediately after the shooting that he had accidentally shot his wife and he later informed a police officer prior to his arrest simply that he had shot his wife. Such statements were received into evidence at trial without objection.

6. Stated succinctly, our conclusions, when taken together, stand for the proposition that a suspect in a custodial environment may, under appropriate circumstances, engage in a waiver of his *Miranda* rights and make an inculpatory statement later admissible at trial even after he has initially refused to talk to a police officer without the presence of counsel.

7. This Court recently dealt with the question of what constitutes a reasonable theory of innocence by resort to the Graven rationale in *State v. Payne,* No. C-790257, unreported (1st Dist. 1980).

8. The appellant told Chief Hamilton after he had been arrested both that his wife had shot herself and that she had been shot accidentally during a struggle with him over the gun. Other statements appear at Note 5, *supra.*

9. The appellant admitted upon cross-examination that he had previously owned shotguns as well as other types of handguns.

10. The appellant had been indicted on a single count of aggravated murder in violation of R.C. 2903.01. After the State presented its evidence at trial, however, the judge presiding granted a motion for acquittal on the charged offense on the ground that the evidence was insufficient to support a finding of prior calculation and design. The case was accordingly submitted to the jury on the lesser included offenses of murder and negligent homicide.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Petition for Writ of Certiorari have been served on Respondent Charles E. Rose by forwarding such copies through the office of his counsel, John A. Crist, Esq., 1605 First Avenue, Middletown, Ohio 45042, by United States Mail, postpaid, this _____ day of April, 1984. I further certify that all parties required to be served have been so served. Respondent's address is the Chillicothe Correctional Institute at Chillicothe, Ohio.

RICHARD DAVID DRAKE
Assistant Attorney General

Office - Supreme Court, U.S.
FILED
MAY 24 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1747

In The
Supreme Court of the United States
October Term, 1983

ARTHUR R. TATE, JR.,
Superintendent Chillicothe Correctional Institute,
Petitioner,

vs.

CHARLES E. ROSE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a State court's conviction involving conflicting statements of the accused, and used in the State's case in chief, decided prior to *Edwards v. Arizona,* 451 U.S. 477 (1981), but not yet final on the date *Edwards* was decided, and thus falling under the rules governing retroactivity as set forth in *United States v. Johnson,* 457 U.S. 537 (1982), can be upheld and a Federal habeas corpus which has been granted can be vacated, in light of the treatment of *Edwards* by the decision in *Solem v. Stumes,* — U.S. —, 104 S.Ct. 1338, 52 U.S.L.W. 4307 (February 29, 1984).

TABLE OF CONTENTS

	Pages
Opinions Below	1
Jurisdiction	2
Constitutional Provisions Involved	2
Statement of the Case	3
Argument Against Granting Certiorari	10

TABLE OF AUTHORITIES

CASES

Edwards v. Arizona, 451 U.S. 477 (1981) 4, 5, 10, 11

Fare v. Michael C., 442 U.S. 707 (1979) 11

Michigan v. Mosley, 423 U.S. 96 (1975) 11

Miranda v. Arizona, 384 U.S. 436 (1966) 3, 4, 8, 11

Rhode Island v. Innis, 446 U.S. 291 (1980) 11

Rose v. Engle, 722 F. 2d 1277 (6th Cir. 1983) 1, 5

Solem v. Stumes, — U.S. —, 104 S. Ct. 1338, 52 U.S.L.W. 4307 (February 29, 1984) 6, 10, 11

United States v. Johnson, 457 U.S. 537 (1982) 5, 10, 11

STATUTES

Ohio Revised Code Section 2903.01 (A) 3

28 U.S.C. Section 1254 (1) 2

CONSTITUTION

Amendment V, Constitution of the United States 2

Amendment VI, Constitution of the United States 2

Section I, Amendment XIV, Constitution of the United States 3

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, reported as *Rose v. Engle,* 722 F. 2d 1277 (6th Cir. 1983) (A-1). The decision of the United States District Court for the Southern District of Ohio, Eastern Division is unreported (A-15). The decision of the Ohio Court of Appeals for the First Judicial District is unreported. (A-29).

JURISDICTION

Jurisdiction is conferred by 28 U.S.C. Section 1254 (1). The decision of the United States Court of Appeals for the Sixth Circuit was entered on November 28, 1983. The Court denied a motion for rehearing and rehearing en banc, and this decision was entered on January 26, 1984.

———o———

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Amendment V to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

This case also involves Amendment VI to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previousy ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

This case also involves Section I of Amendment XIV to the Constitution of the United States:

> SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent, Charles E. Rose, was indicted by the Warren County, Ohio, Grand Jury on one (1) count of aggravated murder in violation of Ohio Revised Code Section 2903.01 (A). A jury trial was had, and respondent was found guilty of murder, a lesser included offense. Respondent was sentenced on May 30, 1979 to a term of 15 years to life, where he has been incarcerated since at the correctional institution at Chillicothe, Ohio, conducting himself as a model prisoner.

Respondent appealed the decision to the First District Court of Appeals for Warren County, Ohio, and his first assignment of error contended that the inconsistent statements were entered contrary to *Miranda v. Arizona,* 384 U.S. 436 (1966). The appellate court reaffirmed the decision of the trial court in allowing the inconsistent statements into evidence.

Respondent thereafter sought discretionary review with the Supreme Court of Ohio. The motion for leave

to appeal was overruled on March 18, 1981. *Edwards v. Arizona,* 451 U.S. 477 (1981), was decided while respondent's case was still open to file a petition for a writ of certiorari.

Respondent then filed a petition for a writ of habeas corpus with the United States District Court for the Southern District of Ohio, Eastern Division. The District Court granted the petition, finding that the rule enunciated in *Edwards v. Arizona, supra,* was violated when Chief Hamilton, on his own initiative, and less than 2 hours after the first interrogation, reinterrogated respondent after respondent had already requested an attorney. At the time of this second interrogation, respondent was having severe stomach problems which later necessitated hospitalization. The District Court held that the *Miranda* rights of respondent were violated by stating

> ". . . the Court concludes that petitioner's right to counsel under *Miranda* was violated since he invoked his right to have counsel present during questioning, and shortly thereafter questioning was resumed without counsel present. . . . Moreover, it is clear that the police did not 'scrupulously honor' his request for an attorney." (A-24)

The District Court did examine the *Edwards v. Arizona, supra,* decision and felt that it was not new law. However, the Court also examined prior law and found that, under *Miranda* and its progeny, that a heavy burden rests on the government to show that a defendant knowingly and intelligently waived his right to counsel. The District Court felt that respondent's rights were not "scrupulously honored" due to the State re-interrogating respondent while he was obviously sick and less than two hours after he had already requested an attorney.

The District Court then found that the error was not harmless because the key issue in the case was whether or not the shooting was accidental, and the comments of respondent which were admitted in the State's case in chief which might have decisively influenced the jury.

Petitioner then appealed to the United States Court of Appeals for the Sixth Circuit. This Court, by opinion dated November 28, 1983, upheld the district court's grant of the writ of habeas corpus, in *Rose v. Engle,* 722 F. 2d 1277 (6th Cir. 1983). The Sixth Circuit based its decision on *United States v. Johnson,* 457 U.S. 537 (1982), wherein the rules of retroactivity set forth in that case were applied to *Edwards v. Arizona, supra. Edwards* was found to be applicable to the case of respondent, under *United States v. Johnson, supra,* because his case was not yet final when *Edwards* was decided. The Sixth Circuit also felt that *Edwards* did not signal a clear break with the past, especially in the jurisdiction of the Sixth Circuit. (A-7). Also, as noted by the Sixth Circuit, *United States v. Johnson, supra,* specifically states:

> "By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed, (or a petition for certiorari finally denied, all) before our decision in *Mapp v. Ohio.*" . . . 102 S. Ct. at 2583 n. 8.
>
> (Emphasis added by alteration of quote). (A-9)

On January 26, 1984, the Sixth Circuit denied petitioner's motion for rehearing and rehearing en banc.

On February 10, 1984, the Sixth Circuit denied petitioner's motion to stay the mandate pending certiorari. Petitioner's motion contained substantially the same is-

sues in the petition before this Supreme Court now. The mandate of the Sixth Circuit was issued on February 13, 1984. Petitioner's application for a stay of the mandate, directed to Justice O'Connor, was denied on February 20, 1984.

On February 29, 1984, this Supreme Court decided *Solem v. Stumes,* — U.S. —, 104 S. Ct. 1338, 52 U.S.L.W. 4307 (February 29, 1984).

The evidence in respondent's case is conflicting and subject to different interpretations. The facts show that respondent was married to Jewell Rose on July 1, 1977. (T. 448). On the morning of December 2, 1978, Jewell Rose was "mad" or upset with Respondent about something (T. 456) and she packed his clothes and loaded them into his car. This happened several times before and was not unusual. Later, after the spat, the clothes would go back into the house. (T. 452). After his wife loaded his clothing into the car, Respondent left the house and went shopping for a washer and dryer and other gifts. (T. 456-458).

Later that day, at approximately 4:00 p.m. Respondent entered the Western Auto Store in Franklin, Ohio to go shopping (T. 458). He left and later returned and bought a .22 calibre handgun but received almost no instruction on its use. (T. 461). After the purchase, he went to a carry-out which he frequented, and then went home. (T. 464).

Later, Franklin Police officers received a call concerning a shooting incident on 722 Park Avenue, the home of the decedent. (T. 162-166). Jewell Savage, a neighbor, testified that at about 4:00 p.m. on the day of the shooting, she observed Respondent as he staggered, dazed, through the alley which separates their houses, with a gun in his

hand, heading toward the home of neighbor, Sandy Stephens. It was she who immediately called the police. (T. 175).

Officers responding to the scene found the body of Respondent's wife lying in the doorway of the home.

After the shooting, Respondent, still dazed, went to Charles and Sandy Stephens' house and made comments heard by Mr. Stephens, his wife Sandy, and Mrs. Stephens' sisters, Verla Raney and Phyllis Raney. Mr. Stephens testified that he was sleeping before Respondent came to his house, but he awoke and heard Respondent pleading, "Sandy, go check on her. If she's hurt bad, I have a murder rap." Phyllis Raney testified Respondent told her he accidentally shot his wife (T. 416), and she further testified that the police initially left word "accidentally" out of her statement. (T. 417). Respondent was also concerned about his wife and pleaded for someone to check on her. (T. 351). At no time did he try to hide. (T. 351, 352). Verla Raney testified that Respondent said he shot his wife, but also that he may have said "accidentally". She was only 14 at the time. She does remember Respondent pleading with them to go check on Jewell. (T. 350, 351).

Sandy Stephens testified Respondent told her to take the gun but does not recall him asking her to hide it. In fact Sandy turned the gun over to the police (T. 170). Officer Pressler got no indication that Respondent told anyone to hide the gun (T. 171).

Respondent was arrested at the Stephens' home and while still dazed and upset, told Officer Pressler, "I shot

my wife". (T. 166). He then co-operated with the officer in being taken to the police station.

Respondent was later advised of his constitutional rights (T. 168). After stating that he understood these rights Respondent told Officer Pressler that he did not want to discuss the incident with him (T. 168) and that he wanted to have an attorney (T. 172), whereupon he was then removed to the jail (T. 168).

Approximately two hours later, Franklin Police Chief, George Hamilton, who was acquainted with Respondent, had him brought forth and interviewed him again, advising him of his *Miranda* rights concerning the incident (T. 218). Respondent ill and confused (T. 472) told conflicting versions of what had transpired (T. 235). However, Respondent does not even remember what he said (T. 473). He even signed a rights card "Charles R." instead of his full name (T. 373). In fact, during his interview with Chief Hamilton, Respondent asked at least four times whether his wife was really dead (T. 379, 380).

Respondent, according to the testimony of Chief Hamilton, said he would tell the truth if he would be promised permission to go home (T. 366). Yet, prior to this, Respondent already gave conflicting stories (T. 235) to the chief showing his dazed and confused state. The discussion ceased when Chief Hamilton received a call from Respondent's attorney (T. 223). Subsequent to his interview, with Chief Hamilton, Respondent entered the hospital for 15-16 days because of his ill health (T. 473, 474) which he suffered from at the time of police interrogation. Testimony was also adduced that the gun involved had a heavy pull but could be fired in the manner in which

Respondent stated he had handled the gun in his attempts to load and unload it (T. 319, 320).

At trial, in addition to testifying about his wife's packing his clothes into the car, Respondent testified that he loaded the revolver in his car, parked in the driveway, with eight or nine bullets just prior to entering the house (T. 465, 491). He accidentally fired a shot through the floorboard of his car while loading the gun (T. 466). He then took the gun into the house and laid it on a table. He then testified he was trying to unload the gun when his wife entered the room and the gun went off accidentally (T. 468).

The statement of Respondent, given while he was upset and very ill, and in violation of his prior request to have an attorney, contained incriminating (conflicting) statements, and was used in evidence at trial, over objections. Upon consideration of the evidence, including the incriminating statements, the jury found Respondent guilty of murder.

The re-interrogation of respondent took place after Chief Hamilton had known that Respondent was arrested and at the jail for an hour and a half (See T. 217). One-half hour later, Chief Hamilton began to re-interrogate Respondent (T. 218). Chief Hamilton even knew that Respondent had been advised of his rights by other officers of his police force (T. 221). Chief Hamilton testified he did not know what respondent told the other officers (T. 221), and was not told by Officer Pressler that Respondent wanted an attorney, but also did not bother to ask what was said by Respondent to the officers (See T. 221-222).

The District Court (A-28) and the Sixth Circuit (A-11) both agreed that the admission of the evidence was not harmless error.

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ARGUMENT AGAINST GRANTING CERTIORARI

The issue in the instant case was resolved in the case of *United States v. Johnson,* 457 U.S. 537 (1982). A conviction is not final unless:

> ". . . the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed (or a petition for certiorari finally denied, all) before our decision in *Mapp v. Ohio.*" . . . 102 S.Ct. at 2583 n. 8 (Emphasis added; alteration of quotation in original). (A-9).

It is clear that under *United States v. Johnson, supra,* that Respondent's case was not "final" when *Edwards v. Arizona,* 451 U.S. 477 (1981) was decided. Petitioner now urges this Supreme Court to disregard its own decision in the *Johnson* case. The concurring opinion of Justice Powell in *Solem v. Stumes,* — U.S. —, 104 S.Ct. 1338, 52 U.S.L.W. 4307 (February 29, 1984), shows that he has urged this Supreme Court to adopt the rule regarding retroactivity that was adopted in *United States v. Johnson, supra.* See 104 S. Ct. at 1347.

This Supreme Court held in *Solem v. Stumes, supra,* that *Edwards* should not ". . . be applied in collateral review of final convictions." 104 S.Ct. at 1345. *Solem v. Stumes, supra,* clearly involved a collateral review of a final 1973 conviction. That is not the situation in Respondent's case.

Respondent respectfully submits that the rule in *Edwards* should be applied as per the rule on retroactivity

already set down in *Johnson*. The case of Respondent involves a sick and dazed man who does not even sign his full name on the *Miranda* rights card, and has statements he made in response to a further interrogation after he had requested counsel used against him at trial. The District Court found that the statements elicited from Respondent were not the result of a knowing, intelligent, and voluntary waiver of his constitiutional rights (A-24). The statements were inconsisted with prior statements of Respondent and were used in the State's case in chief, not as an impeachment tool.

This Supreme Court has shown disapproval in the past of continuing interrogation of a suspect once the assistance of counsel had been requested. See *Michigan v. Mosley,* 423 U.S. 96, 104 n. 10 (1975); *Fare v. Michael C.,* 442 U.S. 707, 719 (1979); *Rhode Island v. Innis,* 446 U.S. 291, 298 (1980). The case of Respondent clearly falls in this area. It had been shown that Respondent's waiver was not knowing, intelligent, or voluntary. We have also seen that the case of *United States v. Johnson, supra,* has settled the retroactivity issue and will clearly make *Edwards v. Arizona, supra,* applicable to this matter.

Since the issue presented in the instant case is already governed by *United States v. Johnson, supra,* as applied to *Edwards v. Arizona, supra,* and is also governed by the principles of waiver outlined in *Miranda v. Arizona,* 384 U.S. 436 (1966) and its progeny, any issue left open by *Solem v. Stumes, supra,* is not applicable to the instant

case, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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